maintain her. I do not believe she made all these complaints quite untruthfully with the intention of establishing a case against the respondent.

The respondent himself was not at all convincing, particularly under cross-examination. He took the line (which, I confess, never commends itself to me) of saying "How can it be proved that I did not give her money". His was not the attitude of a man stoutly asserting the truth, but of a man denying that the other party could prove the truth of her story.

His attempted explanation of his failure to buy kitchen utensils or food for the petitioner, or the children she brought with her, when she went back to live with him at 20 Central Road, Sibu, from the 7th to the 11th of January was absurd and quite unacceptable.

It is also quite clear that when Mr. Sia Ah Chau went with the petitioner on the 11th of January to 20 Central Road, Sibu (after the petitioner had returned from there to her parents' house) that the respondent refused point blank to have the petitioner back. It is plain he did not want her to live with him.

My impression is that, to use a colloquialism, the respondent thought he was "on to a good thing" when the petitioner's parents accepted him as her husband, and received him into their household, and that he throughout acted selfishly for his own benefit alone. His attitude is demonstrated by the fact that he was prepared to, and did, give away his son in adoption to the petitioner's parents.

For all these reasons I believe the petitioner and not the respondent. I hold that throughout the marriage it was the petitioner's parents who supported her and her children (the respondent agreed her father paid the rent of their room) and that throughout the marriage the respondent has completely failed to carry out his duty of supporting and maintaining the petitioner and the children of the marriage. It may be noted that the learned magistrate in the maintenance proceedings (which were brought to the notice of this court) took a different view, but the evidence before him was very scanty and inadequate, and most of what came out before me was not before him.

It also appears that the parties are, to quite a degree, incompatible, but I am not basing my decision on that ground. I rule that the petitioner is entitled to a divorce on the ground that the respondent has completely failed to maintain her (and their children) for a period of over two years.

The adoptive parents (that is the parents of the petitioner) are, of course, entitled to the custody of Tan Sing Chiong, and I cannot and do not make any order concerning him. As to the two girls they must go to the petitioner. This is obvious from the facts of the case; in addition they are girl children, are very young, and the petitioner, successful in her petition, has a settled home with her parents in which to bring them up.

It is accordingly ordered that

(1) the marriage between the petitioner and the respondent registered on the 28th day of August 1959 is hereby dissolved, and

(2) the petitioner have, until further order, the custody of the two daughters of the marriage, namely Kok Bee Yii and Kok Bee Ee.

Petition granted.

TING HOCK SENG v. KONG SING PING

[O.C.J. (McGilligan J.) May 20, 1964]

[Sibu — Civil Suit No. 139 of 1963]

Contract — Settlement — Payment of a smaller sum for a larger sum due — Payment by post-dated cheque — Whether this constitutes consideration.

In this case the paintiff claims repayment of the sum of $15,254.20 being the amount claimed to be due on a building contract under which the defendant, a building contractor, agreed to build houses for the plaintiff. The building contract was rescinded and it was agreed that the moneys paid (i.e. $21,895.70) be refunded. The defendant claimed that the plaintiff had agreed to accept $17,000 in full settlement of the defendant's debt to the plaintiff and that he gave the plaintiff a cash cheque for $3,000 and a post-dated cheque for $14,000. Subsequently at the request of the plaintiff the defendant produced $500 in cash, took back his cheque for $14,000 and gave a cheque for $13,500. Payment of this cheque was subsequently stopped by the defendant at the request of the plaintiff.

Held: as the plaintiff had received negotiable instruments in the form of the two cheques he had received something different from that to which he was entitled to and therefore there was consideration for his agreeing to take $17,000 in settlement of the debt due to him.

[**Editorial Note:** See also *Jagat Singh* v. *Arthur Heng* [1963] M.L.J. 399, where it was held that payment of a smaller sum cannot be good conisderation for accord and satisfaction of a claim for a larger one, yet if there is anything which can be a new consideration and a new benefit to the person entitled to the larger sum, that would support accord and satisfaction.]

Cases referred to:—

(1) *Goddard* v. *Brien* (1882) 9 Q.B.D. 37.

(2) *Royal Bank of Scotland* v. *Tottenham* [1894] 2 Q.B. 715.

CIVIL SUIT.

Plaintiff in person.

C. T. Wong for the defendant.

Cur. Adv. Vult.

McGilligan J.: The plaintiff's claim is for the repayment to him by the defendant of the

sum of $15,254.20. His case is that the defendant, a building contractor, agreed by a written contract to build a house (one unit of five barrack-type houses) for him at the price of $31,000; that the house was to be completed by the end of March 1962; that he by instalments paid to the defendant the total sum of $21,895.70; that the defendant, being unable to complete the building in time, some time in April 1962 approached him and asked him to agree to rescind the building contract, and take a refund of the money already paid (i.e. $21,895.70); that he did agree to this proposal; that the defendant has in fact refunded a total of only $6,641.50; that accordingly the defendant still owes him $15,254.50.

The defendant agrees that there was a written contract between him and the plaintiff for the construction by him of a house for the plaintiff, to be completed by the end of March 1962, at a price of $31,000; that the plaintiff paid him, as part of the purchase price, $21,895.70 in all; and that the contract has been rescinded by mutual consent.

The defendant denies, however, that because he was unable to complete he asked the plaintiff to cancel the contract. He says that the house was not completed by the end of March 1962 because the defendant and the future owners of the other four units (or houses in the row) wanted, or agreed to, an extension of the original design to provide for an open courtyard at the back; that in August 1962 the plaintiff came and asked (indeed begged) him, because of his (the plaintiff's) wife's serious financial difficulties, to rescind the contract and refund the money paid under it; that he agreed to rescind, but was not in a position at once to refund the total sum; that in August and September 1962 he refunded over $2,000.00 to the plaintiff; that in October 1962 he and the plaintiff met at the office in Sibu of Messrs. Seah and Company, advocates; that there it was agreed that he should pay to Mr. Seah for the plaintiff $17,000 for payment of the plaintiff's wife's creditors, the $17,000 to be in full settlement of the defendant's debt to the plaintiff; that he gave to Mr. Seah for the plaintiff $3,000 by cheque, $500, in cash, and $13,500, by a cheque post-dated to the 31st of October 1962; that the latter cheque was later stopped before payment at the request of the plaintiff; that as he has paid to the plaintiff $3,500 (the amount given to Mr. Seah) and a further sum of $3,141.50 — as to the amount repaid the parties are not in dispute — he now owes him $17,000 less $6,641.50, that is $10,358.50.

The plaintiff does not dispute that there was the meeting in Mr. Seah's office in October 1962, or that the defendant gave Mr. Seah for him a cheque for $3,000, $500 in cash, and a post-dated cheque for $13,500. But he made the case, in his written "reply to the statement of defence" and by his cross-examination of Mr. Seah, that he brought the defendant to Mr. Seah's office in order that the $17,000 might be paid to Mr. Seah to hold as the purchase price (or part of the purchase price) of a house belonging to his (the plaintiff's) wife, which the plaintiff was in the process of buying from his wife. Strangely enough, however, he did not make that case in his own evidence, saying in fact that the $3,500 received was paid through Messrs. Seah and Co. to various creditors of his wife. In addition the defendant denies that he agreed to accept $17,000 in full settlement, and says there remained owing over and above the $17,000, a further $4,000 odd.

Mr. Seah, in giving evidence, was very clear that there was no question of the $17,000 being used to buy a house belonging to the plaintiff's wife, but that the arrangement was that it should be used to pay off, through him, the creditors of the plaintiff's wife.

There is no dispute that the $3,500 actually paid, in cash and by a cashable cheque, was used to pay some of the wife's creditors; it is also clear, from the plaintiff's evidence, that some of those creditors were present at the meeting in Mr. Seah's office. Also the plaintiff would have had no reason to have the post-dated cheque for $13,500 stopped on his wife's bankruptcy, unless the money was intended for her creditors.

I have no doubt, and I hold as a fact that the plaintiff and the defendant, and some, at least of the wife's creditors, went to Mr. Seah's office to come to some arrangement whereby the money owed by the defendant to the plaintiff could be used to pay the creditors of the plaintiff's wife.

I hold also that it was the plaintiff who requested the defendant to rescind the building contract and that he did so in August 1962. The defendant produced two sets of plans, one showing the original design and stamped as approved by the Sibu Urban District Council on 10th October 1961, and the other, stated to be an amendment to the earlier one (No. 17 of 1961), stamped as approved by the Sibu Urban District Council on the 23rd of July 1962. I believe the defendant in this and am satisfied that it was generally agreed by the owners-to-be of the five units that a back courtyard should be added and that this extension ot the original plan was (at least) a main reason for the failure to complete by the end of March 1962. In any case, if the defendant's failure to complete then had simply been his own fault, would he then

have gone to the plaintiff and asked to be allowed to rescind? Surely that is not likely, if it was his hope eventually to complete? And he did eventually complete and sell the unit concerned. What seems more probable is that then he would have approached the plaintiff (if at all) to seek an extension of the time for completion. It is most improbable that, without any demands being made of him by the plaintiff (as is the plaintiff's own case), he went to the plaintiff and asked to be allowed to cancel the contract and refund the money paid by him; and this at a time when he was unable to raise (in a short time, at any rate,) the full amount due. There was also the corroborating evidence of Lee Kong Poh, in September 1962 the defendant's employee, that about September 1962 he saw in the defendant's premises the plaintiff actually on his knees to the defendant. I see no reason to disbelieve the evidence of this apparently frank and unbiassed witness. What he saw could have related to something entirely unconnected with this case, but the probabilities are against its being unconnected.

I now come to the meeting at Mr. Seah's office in October 1962, attended by the parties, some at least of the plaintiff's wife's creditors and, of course, Mr. Seah.

The defendant says that at the time of that meeting he had already paid the plaintiff in August and September 1962 at least $2,000, and owed him only $19,000 odd. The plaintiff admits having received some money from the defendant during that period, but says it was for interest. The defendant's evidence was unsatisfactory on this point, as he gave no details of payments, did not state the exact amount repaid, and produced no receipts; however, the plaintiff, though not admitting any exact amount, did not dispute the figure of $2,000 put to him in cross-examination. I accept that between the date in August 1962 when the plaintiff asked for the contract to be rescinded and the meeting in October the defendant paid to the plaintiff approximately $2,000. On my findings, there is no reason why the defendant should have paid interest to the plaintiff, as it was the plaintiff who asked for the contract to be rescinded, and I hold that the approximately $2,000 was repayment of capital, and that at the time of this meeting in October the defendant owed the plaintiff $19,000 odd, in fact approximately $19,800 or $19,900.

It seems clear, and I am satisfied, that at the meeting the plaintiff agreed to take $17,000, to settle the debts of his wife, in full settlement of what was owing to him. That was Mr. Seah's recollection of the matter, though he was not prepared to be completely definite about it. What makes it seem clear to me is that at first the defendant gave (to Mr. Seah for the plaintiff) an immediately cashable cheque for $3,000 and a cheque post-dated to the 31st of October 1962 for $14,000 a total of $17,000. It then was found (Mr. Seah said this and I believe him) that $3,000 was not enough to satisfy the immediate demands. The defendant thereupon produced $500 in cash, but got back his cheque for $14,000, and substituted for it one for $13,500, also post-dated to 31st October 1962, leaving the total still $17,000. This points very plainly to there having been an agreement that the full amount payable was to be $17,000. If the defendant was still regarded as being indebted over and above $17,000 to the plaintiff, it appears to me that the cheque for $14,000 would have been left to stand, to assist in paying off the further debt. A man who can raise $13,500 in a few days or weeks can certainly also raise $14,000. In fact one should have thought he could have raised the full $16,000 or so to pay off the actual amount still unpaid. The natural explanation of all this is that $17,000 had been agreed on as the sum for which the defendant's debt to the plaintiff would be settled. There is also the undoubted fact that the plaintiff and his wife were in very pressing need of money to pay off her creditors; this supplies a good reason for the plaintiff being prepared to take less than was due, if he got it quickly. I therefore hold that the plaintiff did agree at the meeting at Mr. Seah's office in October 1962 to accept $17,000 in full settlement of what was then due to him; and I do not accept as accurate or true the evidence for the plaintiff that the defendant later admitted that he owed a further $4,000 odd to the plaintiff.

It still remains however to be considered whether there was any consideration for the plaintiff's agreeing to take a smaller sum than that actually due. It is said for the defendant that the consideration was the rescission of the building contract (and therefore the giving up of the defendant's rights under it, including his right to use for its breach); but this cannot be so, because rescission was clearly mutually agreed on between the parties some time before the meeting in October 1962, in fact in, as has already been found, August 1962. The consideration for the agreement to rescind in August was the giving up by each party of his rights under the building contract.

It is very well established (and seems obvious) that the payment by a debtor, the position of the defendant here, of a smaller sum for a larger one is not a good discharge of the debt due. Such payment is no more than the debtor is already bound to do, and is no consideration for a promise, express or implied, to forego the residue of the debt. If, however, the

thing done or given by the debtor is in some respect different from that which the creditor was entitled to demand, it will be a good consideration for the promise to discharge. The fact that the difference is slight will not destroy its efficacy in constituting a consideration, for if the courts inquired whether the thing done in return for a promise was sufficiently unlike that to which the promisor was already entitled, they would be inquiring into the adequacy of the consideration; and this the courts will not do.

Payment of a smaller amount than what is due by a negotiable instrument (e.g. a cheque) has been held to constitute consideration (*Goddard* v. *O'Brien,*[1]) as there the creditor is getting something different from (and in a way of more value than) that which he was entitled to get.

Here instead of $19,000 odd in cash, to which he was entitled, the plaintiff got a cheque payable immediately on demand, $500 in cash and a post-dated cheque (dated not very far ahead) for $13,500. The case of the *Royal Bank of Scotland* v. *Tottenham* [2] I take to be authority for the proposition that a post-dated cheque is a negotiable instrument, and in my judgment a post-dated cheque is a negotiable instrument.

The plaintiff therefore got $500 in cash plus two negotiable instruments totalling in value $16,500, something different (and with different possibilities of use) from that to which he was entitled. Accordingly there was consideration for his agreeing to take only $17,000.

In addition he received $3,500 at once and a negotiable instrument for $13,500 encashable in at the very most 3 or 4 weeks, and this can be considered payment at an earlier date than he had a right to expect or insist on, because in the circumstances, the plaintiff being the party who asked for rescission of the building contract, he could expect to get payment in full only when the defendant had been given a reasonable time to obtain sufficient money to put him in a position to refund.

I hold accordingly that there was a binding agreement between the parties that the $17,000 paid to Mr. Seah for the plaintiff should be accepted by the plaintiff in full payment of the amount due to him by the defendant.

There arises, however, yet another obstacle to final decision — the fact that the cheque for $13,500 was stopped before payment. It may be argued that on its stopping the agreement to take $17,000 in full settlement was itself rescinded by mutual agreement, and that therefore the position and the amount due went back to what they were before the agreement was made (except, necessarily, that the debt due was less by $3,500). But this argument cannot be upheld in these circumstances, where the plaintiff has received in fact the amount of $3,500, part of the $17,000 agreed on, and where it was the plaintiff who asked for the cheque to be stopped for his own reasons. Also, ever since the stopping the defendant has clearly been regarded by both parties, as the evidence well shows, as holding the $13,500 (indeed a cheque for $13,500) for the plaintiff.

It is my judgment, therefore, that the plaintiff is now entitled to be repaid by the defendant $10,358.50, not $15,254.50, and I accordingly order that the defendant pay to the plaintiff the sum of $10,358.50.

ADDENDUM.

A.R. Sum of $10,358.50 lodged in court with defence.

Court The plaintiff is awarded the costs up to the date on which the defence was filed and the $10,358.50 was lodged, costs to be taxed. The defendant is awarded his costs of all the proceedings after the date of the lodgment of the said $10,358.50.

Judgment for the plaintiff for the sum found due.

CHOP WONG SOONG CO. v. KHOO HEAN KEE

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) May 22, 1964]

[Ipoh — Federal Court Civil Appeal No. 29 of 1964]

Certiorari — Proceedings before inferior court — No objection taken in — Non-exercise of right of appeal within statutory time limit — Expiration of time for certiorari — English R.S.C. 1883 O. 59 r. 4(2).

This was an appeal from a decision of the High Court, dismissing an application for leave to apply for an order of *certiorari.* The applicant sought to set aside a decision of the Rent Board on the grounds of error in law and failure of natural justice. The applicant although represented by counsel did not raise these matters at the hearing before the Rent Board. The application for *certiorari* was made after the limit of six months laid down by rule 4(2) of Order 59 of the English Rules of Supreme Court.

Held: even apart from the delay, the applicant had disentitled himself to leave to apply for *certiorari* because he took no exception to what was done at the hearing before the Rent Board.

Cases referred to:—

(1) *King* v. *Williams* [1914] 1 K.B. 608.

(2) *Reg.* v. *Justices of Surrey* L.R. 5 Q.B. 466.

(3) *Munday* v. *Munday* [1954] 2 All E.R. 667.

(4) *Fulker* v. *Fulker* [1936] 3 All E.R. 636.

FEDERAL COURT.

N. Sharma for the appellant.

F. C. Arulanandom for the respondent.